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## Williams-Yulee v. Florida Bar: Judicial Elections, Impartiality, and the Threat to Free Speech

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## *WILLIAMS-YULEE V. FLORIDA BAR*: JUDICIAL ELECTIONS, IMPARTIALITY, AND THE THREAT TO FREE SPEECH

### ABSTRACT

Judicial elections have been controversial for many years. The debate surrounding them has heightened as spending in judicial elections has increased in recent years. Critics of judicial elections fear that the electoral process compromises judicial impartiality and independence. Supporters argue that such fears are overblown and that democratically elected judiciaries are superior to ones appointed by other branches of government.

Some states have attempted to regulate judicial elections in order to preserve the appearance and reality of judicial impartiality. In particular, states have sought to limit the content of judicial candidates' speech during elections. Until recently, the Court has not favored such efforts. However, in *Williams-Yulee v. Florida Bar*, the Court for the first time upheld a state's regulation on judicial candidates' speech during an election, holding that Florida's ban on direct financial solicitation from a judicial candidate does not violate the First Amendment.

This Comment argues that, while preserving the appearance and reality of judicial impartiality is necessary to ensure a respected and just judiciary, the Court should not have allowed Florida's ban on direct campaign solicitation by judicial candidates to stand. This Comment argues that the ban violates the First Amendment and that the Court's holding runs against long-standing principles of freedom of speech in elections. Further, this Comment argues that states should appoint their judiciaries. However, such reform is politically unlikely, and therefore states should at least consider reforming their judicial recusal procedures to improve the appearance and reality of judicial impartiality.

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## INTRODUCTION

Judicial elections are not new to this country,<sup>1</sup> but they have been the subject of criticism for over one hundred years.<sup>2</sup> In particular, critics have suggested that judicial elections compromise the appearance and reality of judicial impartiality and independence by pressuring judges to cater their rulings to please the public and their campaigns' financial contributors.<sup>3</sup> Further, the presence of increasing amounts of money in judicial elections<sup>4</sup> only makes this pressure more intense, and judges can appear biased in favor of financial contributors when those persons or groups appear before them in court.<sup>5</sup> Prominent members of the Court have advocated putting an end to judicial elections,<sup>6</sup> but thus far state

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1. See Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 310 (2003).

2. *Republican Party of Minn. v. White*, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring).

3. See, e.g., *id.* at 789-90.

4. James J. Sample et al., *The New Politics of Judicial Elections*, 94 JUDICATURE 50, 51-52 (2010).

5. *White*, 536 U.S. at 788-89 (O'Connor, J., concurring).

6. See, e.g., *id.* at 788-92.

governments and bar associations have sought to limit the influence of the electorate on the judiciary through other means.<sup>7</sup> Most troublingly, states have sought to limit what judges can and cannot say while campaigning to maintain the ideal nature and image of the judiciary.<sup>8</sup>

Until recently, the Court has been suspect of speech restrictions in judicial elections and has generally upheld the rights of judicial candidates to engage in all forms of campaign speech.<sup>9</sup> With its decision in *Williams-Yulee v. Florida Bar*,<sup>10</sup> the Court for the first time upheld a state's restriction on judicial campaign speech, specifically Florida's ban on direct solicitation of money by judicial candidates.<sup>11</sup> The Court held that Florida's restrictions are permitted under the First Amendment to preserve a state's compelling interest in judicial impartiality and independence.<sup>12</sup> This Comment will begin with an overview of the Court's First Amendment theory and analysis and provide a brief history of judicial elections. Next, this Comment will review the Court's recent decisions surrounding judicial elections and provide a description of the Court's opinion in *Williams-Yulee*. This Comment will then argue that, while the appearance and reality of judicial impartiality is necessary to a properly functioning judiciary and should be preserved, the Court should not undermine fundamental First Amendment principles in preserving judicial impartiality. The most effective way to preserve judicial impartiality would be to end judicial elections, but this solution is unlikely in the current political climate. Therefore, this Comment will explore alternative solutions, such as reforming judicial recusal procedures.

## I. BACKGROUND

### A. First Amendment Speech Theory and Analysis

The First Amendment of the U.S. Constitution states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."<sup>13</sup> This Amendment generally affords people the right to express their views regardless of the content of those views.<sup>14</sup> The right to free speech has been considered especially important when speech is political in nature.<sup>15</sup> The latter proposition derives its support from one of the principle theories offered as justification for freedom of speech: self-

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7. See *id.* at 768–69 (majority opinion); see also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888–90 (2009).

8. See *White*, 536 U.S. at 768–69.

9. See *id.* at 776–77.

10. 135 S. Ct 1656 (2015).

11. *Id.* at 1662.

12. *Id.* at 1665.

13. U.S. CONST. amend. I.

14. See *Williams-Yulee*, 135 S. Ct at 1682–83 (Kennedy, J., dissenting); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972).

15. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (stating the First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political office").

governance.<sup>16</sup> This theory holds that freedom of speech is essential to democracy and representative government.<sup>17</sup> In order for democracy to function properly, candidates and citizens must be able to speak openly about political issues.<sup>18</sup> First Amendment scholar Alexander Meiklejohn<sup>19</sup> wrote that “[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”<sup>20</sup> For this reason, Meiklejohn argued that any public speech affecting the issues of self-governance could not be regulated by the government.<sup>21</sup>

Despite its broad language, the First Amendment does not prevent the government from regulating any speech.<sup>22</sup> To determine if a government regulation of speech violates the First Amendment, the Court must decide if the law in question regulates speech based on its content or if the law is “content-neutral.”<sup>23</sup> If the law regulates speech based on its content, then it is considered “presumptively invalid,”<sup>24</sup> and the government must meet the judicial standard of strict scrutiny to justify the regulation.<sup>25</sup>

Strict scrutiny is the most demanding standard of judicial review,<sup>26</sup> and laws typically do not survive its application.<sup>27</sup> To be upheld under

16. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 954–57 (4th ed. 2011); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 6–7 (2d ed. 2003).

17. CHERMERINSKY, *supra* note 16, at 954; SULLIVAN & GUNTHER, *supra* note 16, at 6–7.

18. CHERMERINSKY, *supra* note 16, at 954.

19. Alexander Meiklejohn (1872–1964) was a philosopher and a staunch advocate for free speech. Eugene Cerruti, “Dancing in the Courthouse”: *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 284–85 (1995). Meiklejohn is considered to be a “seminal figure” in First Amendment theory. *Id.* at 283; see also Joseph Russomanno, *The “Central Meaning” and Path Dependence: The Madison-Meiklejohn-Brennan Nexus*, 20 COMM. L. & POL’Y 117, 128 (2015) (“Alexander Meiklejohn is the ‘father of modern [F]irst [A]mendment theory.’” (alteration in original) (quoting Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 782 (1986))); Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111 (1993).

20. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

21. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24–26 (1948).

22. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (“[W]e reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are ‘absolute,’ not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.” (citation omitted)); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”).

23. *Turner Broad. Sys., Inc. v. FEC*, 512 U.S. 622, 642–43 (1994).

24. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

25. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000); see also *Turner*, 512 U.S. at 641.

26. CHERMERINSKY, *supra* note 16, at 554.

strict scrutiny, the Court must find the law necessary to achieve a compelling government purpose.<sup>28</sup> In order for the law to be “necessary,” it must be the least restrictive means of accomplishing the government’s purpose.<sup>29</sup> The Court has frequently stated that a law must be “narrowly tailored” to be the least restrictive means of achieving a government purpose.<sup>30</sup> In determining if a law is narrowly tailored, the Court considers the extent to which the law is underinclusive or overinclusive.<sup>31</sup> In the context of free speech analysis, a law is underinclusive if it does not apply to all speech that is connected to the government’s purpose in enacting the law.<sup>32</sup> A law is overinclusive if it applies to speech not connected to the government’s purpose in enacting the law.<sup>33</sup>

Importantly, the Court has held that the First Amendment does not protect the speech of government employees made in the scope of their professional duties.<sup>34</sup> In *Garcetti v. Ceballos*,<sup>35</sup> the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>36</sup> However, the First Amendment does protect the speech of government employees when their speech is made “as a citizen” and addresses “matters of public concern.”<sup>37</sup>

### B. Judicial Elections and Recent Case Law

Judicial elections have been the subject of serious debate since the founding of this nation.<sup>38</sup> In Article III of the U.S. Constitution, the Founders chose to insulate the federal judiciary from the electorate by having the President appoint judges for life, subject to confirmation by the Senate.<sup>39</sup> The Founders thought the differing roles of judges and oth-

27. *Id.*; see also Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as “‘strict’ in theory and fatal in fact”).

28. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973).

29. CHEMERINSKY, *supra* note 16, at 554.

30. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

31. CHEMERINSKY, *supra* note 16, at 689–90.

32. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 349–51 (1949) (discussing the concept of underinclusivity generally).

33. See *id.* at 351 (discussing overinclusivity generally).

34. *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006). For a discussion of the importance of this holding, see *infra* Section III.B.

35. 547 U.S. 410 (2006).

36. *Id.* at 421.

37. *Pickering v. Bd. of Educ. of High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1968).

38. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672–73 (2015); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 34–37 (1986); Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 2 (1995).

39. *Dimino*, *supra* note 1, at 306–10.

er politicians to be essential to the functioning of the federal government, and maintaining judicial independence and impartiality is considered "the foundational principle—of Article III."<sup>40</sup> Further, the Founders thought that a judiciary independent of the voting public was essential to the protection of minority viewpoints from a possibly tyrannical majority.<sup>41</sup> In *The Federalist No. 78*, Alexander Hamilton stated the following:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.<sup>42</sup>

However, the states were left open to determine how their judges would be selected, and throughout the nineteenth century, many states decided on judicial elections.<sup>43</sup> While a majority of states have held judicial elections since the early twentieth century, progressive reformers in the 1920s and 1930s advocated for judicial appointment.<sup>44</sup> In an attempt to regulate candidate speech in judicial elections, the American Bar Association (ABA) first drafted guidelines for judicial electoral conduct in 1924, and in 1972 the ABA amended its Canons of Judicial Ethics to prohibit judicial candidates from promising certain conduct during their time in office or from announcing their personal opinions on legal or political questions.<sup>45</sup> Numerous states adopted the ABA's amended canons, and these state laws would eventually be challenged as violations of the First Amendment's guarantee of free speech.<sup>46</sup>

In *Republican Party of Minnesota v. White*,<sup>47</sup> a group of judicial candidates and political organizations challenged Minnesota's adoption

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40. *Id.* at 306.

41. Scott W. Gaylord, *Unconventional Wisdom: The Roberts Court's Proper Support of Judicial Elections*, 2011 MICH. ST. L. REV. 1521, 1526. "Tyranny of the majority" is a term used to describe the oppression of minority groups and viewpoints by a majority in a democracy. LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 1–3 (1994). Majority tyranny can arise in heterogeneous democratic societies where the majority cannot be said to represent the interests of the entire populous. *Id.* at 3 ("The majority is likely to be . . . indifferent to the concerns of the minority."). "The tyranny of the majority, according to [James] Madison, requires safeguards to protect 'one part of the society against the injustice of the other part.'" *Id.* (quoting *THE FEDERALIST* NO. 51 (James Madison)).

42. *THE FEDERALIST* NO. 78, at 440 (Alexander Hamilton) (Issac Kramnick ed., 1987).

43. Gaylord, *supra* note 41, at 1522; Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1261–62 (2008) (stating that by 1909 thirty-five states selected their judges by partisan election).

44. Gaylord, *supra* note 41, at 1530; *see also* Geyh, *supra* note 43, at 1261–62.

45. Dimino, *supra* note 1, at 314.

46. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 768–70 (2002). A clause prohibiting judges from announcing their personal opinions on legal or political questions have been referred to as an "announce clause." *Id.* at 768.

47. 536 U.S. 765 (2002).

of an “announce clause”<sup>48</sup> as an unconstitutional abridgment of speech under the First Amendment.<sup>49</sup> The Court ruled the announce clause was unconstitutional. It reasoned that the clause imposed a restriction on speech based on its content and that the content in question, the political viewpoints of candidates, is speech that is afforded the utmost protection under the First Amendment.<sup>50</sup>

Further, the Court reasoned that Minnesota failed to meet the burden of strict scrutiny, which requires that a state law or regulation abridging speech protected by the First Amendment be narrowly tailored to serve a compelling state interest.<sup>51</sup> The Court held that Minnesota had a compelling interest in maintaining the impartiality of its judiciary in appearance and reality.<sup>52</sup> However, the Court also held that the announce clause was not narrowly tailored to serve that interest because the clause restricted all speech associated with the particular legal or political views of the judicial candidates.<sup>53</sup>

Moreover, the Court held that the possibility of bias resulting from a judge’s preconceived views on legal issues does not violate a litigant’s due process right to an impartial trial.<sup>54</sup> The Court reiterated this point by asserting that a judicial candidate whose mind “was a complete *tabula rasa* in the area of constitutional adjudication” would be unfit to serve as a judge.<sup>55</sup> Further, even if Minnesota had characterized its interest as assuring litigants an “open-minded[]” judge, the announce clause would still fail under strict scrutiny because a judge’s speech during a campaign is potentially only a small portion of his or her overall speech on political issues.<sup>56</sup> Finally, Justice Kennedy asserted that Minnesota could adequately maintain its interest in judicial impartiality through robust recusal standards.<sup>57</sup>

The majority opinion in *White* established that judicial elections would be held to basically the same First Amendment standards as other political elections<sup>58</sup> and that a litigant’s due process rights are not necessarily infringed by a judge’s speech during an election.<sup>59</sup> However,

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48. *Id.* at 769–70. The “announce clause” stated “that a ‘candidate for a judicial office, including an incumbent judge,’ shall not ‘announce his or her views on disputed legal or political issues.’” *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT r. 5(A)(3)(d)(i) (2000)). Minnesota’s clause was based on Canon 7(B) of the 1972 ABA Model Code of Judicial Conduct. *Id.*; see MODEL CODE OF JUDICIAL CONDUCT Canon 7(B) (AM. BAR ASS’N 1972).

49. *White*, 536 U.S. at 773–74.

50. Gaylord, *supra* note 41, at 1535.

51. See *White*, 536 U.S. at 774–77. See generally *supra* Section I.A.

52. *White*, 536 U.S. at 775–76.

53. *Id.* at 776.

54. *Id.* at 782–83.

55. *Id.* at 778 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972)).

56. See *id.* at 79–80.

57. *Id.* at 794 (Kennedy, J., concurring).

58. Dimino, *supra* note 1, at 318.

59. See Gaylord, *supra* note 41, at 1535.



*Caperton v. A.T. Massey Coal Co.*<sup>60</sup> provided the Court with an instance to examine the role of financial contributions in judicial elections.<sup>61</sup> The Court ruled that the due process rights of a litigant can be violated when an adverse party who financially contributed to a judge's campaign subsequently comes before that judge in a court proceeding.<sup>62</sup>

In *Caperton*, Justice Brent Benjamin, a West Virginia appellate judge, refused to recuse himself from presiding over the appeal of a \$50 million verdict against a corporation run by Donald Blankenship, a contributor to Benjamin's judicial campaign.<sup>63</sup> The jury verdict against the corporation was awarded shortly before the 2004 West Virginia Supreme Court of Appeals elections, and Blankenship provided more than \$500,000 to Benjamin's campaign through independent expenditures.<sup>64</sup> Further, Blankenship donated nearly \$2.5 million to a political organization that supported Benjamin's campaign.<sup>65</sup> These contributions were greater than the total amount spent by all of Benjamin's other supporters on the campaign and three times what was spent by Benjamin's own committee.<sup>66</sup>

The Court held that there is a significant "probability of bias" where "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."<sup>67</sup> Further, the Court held that the CEO's contributions rose to the level of being "significant and disproportionate" and that Justice Benjamin's failure to recuse himself violated *Caperton*'s due process rights to a fair trial.<sup>68</sup> The opinion did not rule in any way against the ability of individuals to contribute financially to judicial elections. Rather, the opinion established that judicial impartiality could be preserved in extreme cases through the "probability of bias" recusal rule, as well as through state regulations on judicial conduct.<sup>69</sup>

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60. 556 U.S. 868 (2009).

61. *Id.* at 872.

62. See Gaylord, *supra* note 41, at 1539.

63. *Caperton*, 556 U.S. at 873–75.

64. *Id.* at 873.

65. *Id.*

66. See *id.* at 873.

67. *Id.* at 884.

68. *Id.* at 872, 885.

69. Gaylord, *supra* note 41, at 1539–40 (quoting *Caperton*, 556 U.S. at 884); see also *Caperton*, 556 U.S. at 889–90. The current ABA Model Code of Judicial Conduct requires that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A) (AM. BAR ASS'N 2010). A more recent provision requires judges to recuse themselves when they know a party or their attorney donated money to their campaign, but the actual dollar amount that requires recusal is left for states to decide. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(4) (AM. BAR ASS'N 2010). Numerous states adopting the Model Code have either declined to include Canon 2.11(A)(4) or have altered the language significantly. See AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS (2015) [hereinafter ABA, COMPARISON],

While *Caperton* is an illustration of the apparent harm judicial elections can cause to judicial impartiality, the Court's decision in *Citizens United v. Federal Election Commission*<sup>70</sup> drastically heightened many people's fear that judicial elections inevitably erode judicial integrity in appearance and actuality.<sup>71</sup> In *Citizens United*, the Court held that the First Amendment protects the political speech of corporations, including independent campaign expenditures in all elections, and that Congress and state legislatures may not censor corporate speech on the basis of its content.<sup>72</sup> Critics of the decision suggested that this ruling guaranteed greater financial expenditures in judicial elections because states could no longer limit corporate spending on those campaigns.<sup>73</sup> Therefore, judicial elections could now be "conducted amid unlimited corporate spending," further destroying the public's confidence in an impartial and independent judiciary by suggesting that corporations could influence judicial decision-making through massive campaign contributions.<sup>74</sup>

The combined effect of *White* and *Citizens United* created the impression that the Court would continue to affirm the First Amendment's guarantee of free speech in judicial elections over a state's interest in limiting that speech.<sup>75</sup> While the Court has acknowledged that states have an interest in preserving judicial impartiality,<sup>76</sup> the Court has been comfortable with preserving that interest through the recusal process alone.<sup>77</sup> Further, the Court has downplayed the difference between judges and

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[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2\\_11.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf).

70. 558 U.S. 310 (2010).

71. Gaylord, *supra* note 41, at 1541–43.

72. *Citizens United*, 558 U.S. at 342–44, 365.

73. Gaylord, *supra* note 41, at 1543.

74. *Id.*; Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1984 (2011); see also Vernon Valentine Palmer & John Levensis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008) (presenting empirical data demonstrating that campaign contributions influenced the decisions of the Louisiana Supreme Court when donors appeared before them in court); Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (presenting evidence that justices on the Ohio Supreme Court voted in favor of campaign contributors seventy percent of the time).

75. In *White*, the Court held that the First Amendment protects judicial campaign speech. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that Minnesota's restriction on judicial candidates announcing their views is a violation of the First Amendment). In *Citizens United*, the Court held that the First Amendment protects independent expenditures by corporations in elections. 558 U.S. at 342–44, 365. These cases show the Court's history of supporting free speech over states' attempts to regulate speech in elections, suggesting that this Court would continue to show support for more electoral speech in future cases.

76. Gaylord, *supra* note 41, at 1535 (summarizing the holding of *White*).

77. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (holding that judicial recusal is required when "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."); *White*, 536 U.S. at 794 (Kennedy, J., concurring) (stating that states can "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards" to protect judicial integrity).

other elected officials, arguing that both are basically afforded the same speech rights in campaigns under the First Amendment.<sup>78</sup>

## II. *WILLIAMS-YULEE V. FLORIDA BAR*

### A. *Facts*

In September 2009, Williams-Yulee campaigned unsuccessfully for a seat on the county court of Hillsborough County, Florida.<sup>79</sup> At the onset of her campaign, Williams-Yulee drafted and mailed a letter to the public in which she announced her candidacy and asked for campaign contributions.<sup>80</sup> Following the campaign, the Florida Bar brought a complaint against Williams-Yulee alleging that her letter violated the Rules Regulating the Florida Bar.<sup>81</sup> The rules require that judicial candidates abide by the Florida Code of Judicial Conduct, which includes a “ban on personal solicitation of campaign funds.”<sup>82</sup> Specifically, Canon 7C(1) states that judicial candidates “shall not personally solicit campaign funds . . . but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate’s campaign.”<sup>83</sup> Williams-Yulee did not dispute that she had drafted and signed a letter asking for campaign contributions.<sup>84</sup> Instead, she argued that Canon 7C(1) was a violation of the First Amendment, which protected her right to solicit campaign contributions directly.<sup>85</sup>

### B. *Procedural History*

The Florida Supreme Court appointed a referee to make a recommendation on the case, and the referee determined in a hearing that Williams-Yulee should be found guilty.<sup>86</sup> The Florida Supreme Court accepted the referee’s determination, ruling that while Canon 7C(1) is a restriction on speech, the canon met the demands of strict scrutiny as required by the First Amendment.<sup>87</sup> The United States Supreme Court granted certiorari.<sup>88</sup>

### C. *Opinion of the Court*

Chief Justice Roberts authored the opinion of the Court.<sup>89</sup> Justices Breyer, Sotomayor, and Kagan joined the Chief Justice in his full opin-

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78. See *White*, 536 U.S. at 784.

79. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1663 (2015).

80. *Id.*

81. *Id.*

82. *Id.* at 1663–64.

83. *Id.* at 1663 (quoting FLA. CODE OF JUDICIAL CONDUCT r. 7C(1) (2014)).

84. *Id.* at 1664.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1662.

ion, and Justice Ginsburg joined him except as to Part II.<sup>90</sup> The Court affirmed the Florida Supreme Court's ruling, finding that Canon 7C(1) satisfies the demands of strict scrutiny and is therefore permitted under the First Amendment.<sup>91</sup> Chief Justice Roberts began by holding that the Court should apply strict scrutiny in this case because the Court has "long recognized, [that] speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection."<sup>92</sup> Further, Chief Justice Roberts reasoned that a lesser standard of review would be "a poor fit for this case."<sup>93</sup> He stated that all parties admit that the Canon 7C(1) infringes on Williams-Yulee's speech based on its content, and therefore the Court must review the law under strict scrutiny as required by the First Amendment.<sup>94</sup>

The Court then considered if Canon 7C(1) met the demands of strict scrutiny and concluded that it did.<sup>95</sup> Chief Justice Roberts asserted that the Canon was adopted to serve the state's interest in maintaining the integrity of the judiciary—in appearance and in actuality—and that the Court's precedents have long recognized such an end as a compelling "state interest of the highest order."<sup>96</sup> He then declared that, while both parties spent time comparing Canon 7C(1) to campaign financing restrictions in other types of elections, such comparisons were not warranted because judges serve a different public function than other elected officials.<sup>97</sup> He argued that judges are not to consider their campaign supporters or donors in their rulings.<sup>98</sup> Rather, they are expected to be neutral, evenhanded adjudicators.<sup>99</sup> As a result, he concludes that judicial elections may be regulated differently from other elections.<sup>100</sup>

Further, the Chief Justice stated that the mere possibility of a judge giving campaign contributors an unfair advantage in judicial proceedings is enough to justify Florida's enactment of Canon 7C(1).<sup>101</sup> He reasoned that when judges directly solicit members of the public and the bar for campaign money, the result is the "unavoidable appearance" that judges might no longer perform their duties in an impartial manner.<sup>102</sup> Moreover, Justice Roberts stated that such solicitation can create a fear amongst

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90. *Id.* at 1656.

91. *Id.* at 1662, 1670.

92. *Id.* at 1665.

93. *Id.*

94. *Id.* at 1664–65.

95. *Id.* at 1665–66.

96. *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

97. *Id.* at 1667.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1667–68.

102. *Id.* at 1667.

lawyers and litigants that if they do not contribute to a judge's campaign, they will suffer a disadvantage in that judge's courtroom.<sup>103</sup>

Next, the Chief Justice addressed whether Canon 7C(1) is narrowly tailored to fit Florida's compelling interest in maintaining judicial integrity.<sup>104</sup> He began by addressing Williams-Yulee's argument that Canon 7C(1) is underinclusive because it does not prohibit other potentially compromising forms of campaign fund solicitation, such as the solicitation by campaign committees and personal thank-you notes written by judges to their financial contributors.<sup>105</sup> The Chief Justice dismissed this argument, stating that while underinclusiveness can be problematic for a law seeking to survive strict scrutiny, the First Amendment has no "free-standing 'underinclusiveness limitation.'"<sup>106</sup> Further, he held that states are not required to eliminate all threats to their compelling interest in a single action.<sup>107</sup> Justice Roberts stated that Florida reasonably concluded that personal campaign solicitations are a greater threat to the appearance of judicial impartiality than committee solicitations or personal thank-you notes.<sup>108</sup> Therefore, he held that Canon 7C(1) does not fail under strict scrutiny for failing to prohibit other forms of judicial speech.<sup>109</sup>

The Chief Justice then addressed Williams-Yulee's argument that Canon 7C(1) is unconstitutional because it restricts too much judicial speech and that it is not the least restrictive means of advancing Florida's interest.<sup>110</sup> He concluded otherwise, asserting that Canon 7C(1)'s prohibition of personal campaign solicitations by judges is a "narrow slice of speech"<sup>111</sup> and that Florida is allowed to regulate personal campaign solicitations by judges in any form in which they might occur.<sup>112</sup> Finally, his opinion considered Williams-Yulee's contention that Florida's interests would be better served through recusal procedures and campaign finance limitations.<sup>113</sup> Chief Justice Roberts disagreed, asserting that such recusal rules could shut down some jurisdictions where judges received a large amount of contributions from lawyers and litigants. Further, he reasoned that a "flood of postelection recusal motions" could be harmful to the appearance of judicial impartiality and "thereby exacerbate the very appearance problem the state is trying to solve."<sup>114</sup> Justice Roberts also expressed concern that recusal procedures could incentivize lawyers to contribute to judicial campaigns "solely as a means to trigger [a

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103. *Id.* at 1668.

104. *Id.* at 1668–72.

105. *Id.* at 1668.

106. *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)).

107. *Id.*

108. *Id.* at 1669.

109. *Id.* at 1669–70.

110. *Id.* at 1670.

111. *Id.*

112. *Id.* at 1671.

113. *Id.*

114. *Id.* at 1671–72.

judge's] later recusal" and thereby allow for forum shopping.<sup>115</sup> On the subject of campaign contributions, he reasoned that a state may conclude that small contributions can affect the appearance of judicial impartiality just as significantly as large ones.<sup>116</sup>

#### D. Justice Breyer's Concurring Opinion

Justice Breyer's short concurrence expressed his view that the scrutiny levels applied by the Court in various contexts should be viewed as guidelines rather than strict rules.<sup>117</sup> He cited previous cases where he voiced this position but did not provide any additional reasoning.<sup>118</sup>

#### E. Justice Ginsburg's Concurring Opinion

Justice Ginsburg wrote a separate opinion in response to Part II<sup>119</sup> of the majority opinion to express her view that strict scrutiny should not be applied to state actions regulating speech in judicial elections.<sup>120</sup> She reasoned that judges are different from politicians and that rules regulating other political elections should not be applied to judicial elections.<sup>121</sup> She held that while recent Court decisions, such as *Citizens United*, have greatly increased the potential for "monied interests . . . 'in representative politics,'" such judgments should not apply to judicial elections because judges are "not 'expected to be responsive to [the] concerns' of constituents."<sup>122</sup> Further, Justice Ginsburg argued that applying the standards of other elections to judicial elections blurs the distinction between judges and politicians, citing how unbridled spending in judicial elections has "threaten[ed] both the appearance and actuality of judicial independence."<sup>123</sup> She concluded that states should be allowed to balance the interest of having an impartial judiciary free of improper financial influence with the constitutional interest in freedom of speech.<sup>124</sup>

115. *Id.* at 1672.

116. *Id.*

117. *Id.* at 1673 (Breyer, J., concurring).

118. *Id.* Justice Breyer's opinion reads as follows:

As I have previously said, I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied. See, e.g., *United States v. Alvarez*, 567 U.S. —, —, 132 S.Ct. 2537, 2551–2553, 183 L.Ed.2d 574 (2012) (BREYER, J., concurring in judgment); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400–403, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring). On that understanding, I join the Court's opinion.

*Id.*

119. Part II of the majority opinion held Canon 7C(1) must survive strict scrutiny analysis if it is to be held constitutional under the First Amendment. See *id.* at 1664–65 (majority opinion).

120. *Id.* at 1673 (Ginsburg, J., concurring).

121. *Id.*

122. *Id.* at 1673–74 (second alteration in original) (first quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part); then quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014)).

123. *Id.* at 1674–75.

124. *Id.* at 1675.

*F. Justice Scalia's Dissenting Opinion*

Justice Scalia, joined by Justice Thomas, authored the first dissent.<sup>125</sup> He began by stating that all speech is fully protected under the First Amendment unless there is a longstanding tradition of regulating the speech at issue and that there is no such history pertaining to judicial campaign speech.<sup>126</sup> Justice Scalia then argued that, while Florida likely has a compelling interest in maintaining the appearance of judicial impartiality, Canon 7C(1) is not narrowly tailored to address Florida's interest.<sup>127</sup> He stated that Florida's definition of its interest in the "public confidence in judicial integrity" is vague and that the Court ignores aspects of that interest throughout its opinion when addressing other forms of judicial speech, such as committee solicitation and personal thank-you notes.<sup>128</sup>

Justice Scalia moved on to conclude that Florida did not meet its burden of demonstrating that personal solicitation by judicial candidates significantly diminishes the public's trust in the judiciary.<sup>129</sup> Further, he argued that our nation's long history of judicial elections allowing personal solicitations suggests that such speech does not trouble the public.<sup>130</sup> Next, Justice Scalia argued that Canon 7C(1) is vastly overinclusive because the canon unnecessarily bans all personal solicitation, even those that do not threaten the public's confidence in the integrity of the judiciary, such as the mass mailing at issue.<sup>131</sup> Further, he argued that Canon 7C(1) fails to prohibit all personal solicitations by judicial candidates, pointing out that judges are not prohibited from asking for personal gifts from campaign supporters.<sup>132</sup> Justice Scalia went on to state that the First Amendment prohibits the abridgment of speech based on its content and that the Court's opinion violates this principle by prohibiting personal campaign solicitations by judges but not personal solicitation by judges for other purposes.<sup>133</sup> He concluded that the true motivation behind Canon 7C(1) appears to be a general hostility towards judicial elections.<sup>134</sup>

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125. *Id.* (Scalia, J., dissenting).

126. *Id.* at 1676.

127. *Id.* at 1676-77.

128. *Id.* at 1677-78 (quoting *id.* at 1666 (majority opinion)).

129. *Id.* at 1678-79 (Scalia, J., dissenting).

130. *Id.* at 1678.

131. *Id.* at 1679.

132. *Id.* at 1680.

133. *Id.* at 1681.

134. *Id.* at 1681-82 ("Canon 7C(1)'s scope suggests that it has nothing to do with the appearances created by judges' [sic] asking for money, and everything to do with hostility toward judicial campaigning. How else to explain the Florida Supreme Court's decision to ban *all* personal appeals for campaign funds (even when the solicitee could never appear before the candidate), but to tolerate appeals for other kinds of funds (even when the solicitee will surely appear before the candidate)? It should come as no surprise that the ABA, whose model rules the Florida Supreme Court followed when framing Canon 7C(1), opposes judicial elections . . .").

### G. Justice Kennedy's Dissenting Opinion

Justice Kennedy argued that the Court's opinion is based on the premise that "the public lacks the necessary judgment to make an informed choice" in judicial elections and that judicial elections should be regulated differently than other political elections because of the special nature of judges.<sup>135</sup> While he admitted that Florida may have a compelling interest in protecting the appearance and reality of judicial integrity, Justice Kennedy argued that this interest does not trump basic First Amendment principles.<sup>136</sup> He gave an example of how a qualified but underfunded and less well-known judicial candidate could suffer a severe disadvantage in an election and argued that the canon effectively curtails beneficial debate in the public sphere where a candidate cannot get his message out.<sup>137</sup> Justice Kennedy also stated that the Court's opinion greatly weakens the strict scrutiny standard by creating precedent to undermine it, describing the opinion as a "guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes."<sup>138</sup>

### H. Justice Alito's Dissenting Opinion

Justice Alito stated that he largely agreed with the analyses of Justice Scalia and Justice Kennedy.<sup>139</sup> He expressed his view that, while Florida has a compelling interest in maintaining the impartiality and integrity of the judiciary, Canon 7C(1) "is not narrowly tailored to serve that interest."<sup>140</sup> Like Justice Scalia, he pointed out that the Canon restricts forms of speech that do not threaten judicial integrity or the public's perception of it.<sup>141</sup> Further, he echoed Justice Kennedy's concern that the majority opinion weakens strict scrutiny by providing such a poor analysis of when a law is "narrowly tailored."<sup>142</sup>

## III. ANALYSIS

In *Williams-Yulee*, the Court went against the trend established by *White* and *Citizens United* by identifying an area where the scope of First Amendment protections is not the same in judicial elections as it is in other elections.<sup>143</sup> By ruling that states can prevent judicial candidates

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135. *Id.* at 1683 (Kennedy, J., dissenting).

136. *Id.*

137. *Id.* at 1683–85.

138. *Id.* at 1685.

139. *Id.* (Alito, J., dissenting).

140. *Id.*

141. *Id.*

142. *Id.*

143. See *Citizens United v. FEC*, 558 U.S. 310, 312 (2010) (holding that a federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment); *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that Minnesota's restriction on judicial candidates announcing their views is a violation of the First Amendment). *Williams-Yulee*, however, held that Florida's restriction on direct campaign fund solicitation by judicial candidates was not a violation of the First Amendment. 135 S. Ct. at 1666.



from personally soliciting campaign funds, the Court withheld a right from judicial candidates that their legislative and executive counterparts enjoy.<sup>144</sup> In so ruling, the Court justified its decision primarily on the notion that judges serve a different function than politicians and that difference allows judicial elections to be regulated differently than other elections.<sup>145</sup>

This analysis will first argue that, ideally, judges should serve a different role than politicians, but judicial elections cause judges to behave very similarly to politicians. Next, this part will consider how best to achieve the ideals of judicial impartiality and independence by addressing speech restrictions and recusal procedures.<sup>146</sup> This part also will argue that the Court's decision in *Williams-Yulee* is undesirable because judicial impartiality should not come at the expense of fundamental First Amendment principles. Finally, this part will suggest that the best way to ensure judicial impartiality is to encourage states to get rid of their judicial election systems and to adopt lifetime judicial appointment regimes.

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144. See Lauren Garcia, Note, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under the Federal Funds Bribery Statute*, 65 Rutgers L. Rev. 229, 230 (2012) ("American election campaigns and political platforms have historically been privately funded; public officials have an interest in soliciting contributions in order to represent and serve their constituents.").

145. See *Williams-Yulee*, 135 S. Ct. at 1667.

146. This Comment will not address merit selection—also known as the Missouri Plan. See James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87, 92 (2013). While this method of judicial selection varies amongst the states that have adopted it, the process usually involves judicial appointment by the state's governor from a list of candidates selected by a judicial vacancy commission. *Id.* After serving on the bench for a period of time, the judge's performance is evaluated by a retention election where voters decide whether the judge should be retained. Dimino, *supra* note 1, at 374 n.436. Proponents of merit selection maintain that merit selection eliminates much of "the influence of campaign contributions" in judicial elections. Bopp, *supra*, at 93. However, there is evidence that retention elections have become increasingly politicized, and spending has increased in retention elections dramatically. See *Williams-Yulee*, 135 S. Ct. at 1674–75 (Ginsberg, J., concurring); BILLY CORRIHER, MERIT SELECTION AND RETENTION ELECTIONS KEEP JUDGES OUT OF POLITICS 1 n.7 (2012), <https://cdn.americanprogress.org/wp-content/uploads/2012/11/JudicialElectionsPart3-C4-2.pdf>. These facts suggest that merit selection systems, while arguably a better system than contested elections, may now suffer from some of the same impartiality issues as contested elections, although likely to a much lesser degree.

Another potential solution that is beyond the scope of this Comment is public financing for judicial candidates. Public financing—first adopted by North Carolina in 2002—is a system where states offer public money to judicial candidates in order to lessen the need for solicitation of private campaign money. Gaylord, *supra* note 41, at 1543. While this method is a promising solution in theory to the issues of judicial impartiality created judicial elections, the viability of public financing took a hit after the Court's ruling in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*. See 131 S. Ct. 2806, 2813 (2011). Arizona's "matching funds" provision allowed a candidate to receive additional campaign money to match a privately funded candidate's fundraising when the privately funded candidate's campaign expenditures exceeded the initial amount granted to publicly funded candidates. *Id.* The Court ruled the provision was unconstitutional because it imposed an impermissible penalty on candidates who choose to "robustly exercise[] [their] First Amendment right[s]." *Id.* at 2818 (third alteration in original) (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)). Further, the Court held Arizona's rule violated the First Amendment by incorporating independent expenditures made by third parties in calculating if the privately funded candidate had exceeded the public spending cap. *Id.* at 2819. By eliminating the option of "matching funds," the Court took away many candidates' incentive to rely on public financing, since use of state funds usually comes with restrictions on how the money can be used and how much private money a candidate can raise in addition. Gaylord, *supra* note 41, at 1543–44, 1548.

However, such sweeping adoption of the federal system is politically unlikely.<sup>147</sup> Therefore, this part will conclude that pursuing more rigorous and automatic recusal procedures may be the only politically feasible way of solving at least some of the impartiality problems posed by judicial elections.

#### *A. Judicial Elections Compromise the Role of the Judiciary*

In the opinion of the Court, Chief Justice Roberts stated that “[j]udges are not politicians,” and, unlike politicians, judges are not supposed to be responsive to the desires of their supporters and financial contributors in the performance of their duties.<sup>148</sup> Judges are to “‘observe the utmost fairness,’ striving to be ‘perfectly and completely independent, with nothing to influence or [control them] but God and [their] conscience.’”<sup>149</sup> Recognizing the unique role of judges, the Founders were correct to enshrine a mechanism in the Constitution to protect judicial independence and impartiality. The proper function of society depends on a fair and balanced judiciary, and the public must perceive the judiciary as being fair and balanced to honor its rulings.<sup>150</sup> Without a properly functioning judiciary, people may begin to lose faith in the courts as administrators of justice and could resort to “violent, extralegal and possibly criminal practices” to resolve their disputes.<sup>151</sup>

What assures a fair and balanced judiciary in Article III is a judicial appointment system where judges serve for life “during good Behaviour [sic].”<sup>152</sup> Life appointment allows judges to be unconcerned with public opinion, financial contributors, or “congressional or presidential reaction to any particular ruling.”<sup>153</sup> In theory, this allows judges to apply the law to the facts presented to them without feeling beholden to any special interest or pressure.

The idea of perfect judicial impartiality, even in an appointment system like that of the federal government’s, is never completely attainable. Judges are human beings, and like all other human beings, they harbor some biases based on their personal experiences and beliefs.<sup>154</sup> But

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147. See *infra* Section III.E.

148. Williams-Yulee, 135 S. Ct. at 1662, 1667.

149. *Id.* at 1667 (quoting *Address of John Marshall*, in PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, at 616 (1830)).

150. Norman L. Greene, *How Great is America’s Tolerance for Judicial Bias? An Inquiry into the Supreme Court’s Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 884–85 (2010).

151. Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT’L L. 9, 19 (2005).

152. U.S. CONST. art. III, § 1.

153. Dimino, *supra* note 1, at 306.

154. See LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, at 6–7 (1986) (emphasizing how legal realists believe judicial “idiosyncrasy,” such as a judges political, social, and economic views, can subconsciously affect judicial decision-making).

this degree of impartiality is acceptable so long as a judge applies the law based on what he or she believes the appropriate and just result should be. What is undesirable, however, is a judge who rules not based on his or her own understanding of the law or justice but rather in response to outside pressures from members of the public and financial contributors who desire a particular result regardless of what the law is or should be. Unfortunately, the latter behavior is inevitable under a system where voters elect judges, which in effect requires judges to behave just like other politicians who respond to the electorate and their financial supporters in the performance of their duties.<sup>155</sup>

Few people would be impervious to the fact that they may lose their job when they are accountable to the public and the public is dissatisfied with their decisions.<sup>156</sup> Indeed, the influence of public opinion on the decisions of an elected judge has been likened to “a crocodile in your bathtub . . . [y]ou know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.”<sup>157</sup> Similarly, a judge cannot help but feel the pressure of ruling in favor of a financial contributor to his or her campaign when that contributor appears before them in court.<sup>158</sup> Even if they were able to resist that pressure, the appearance of impartiality and justice can nonetheless be diminished in the eyes of the public.<sup>159</sup> Thus, judicial elections create a serious problem for states that have adopted them but nonetheless wish to preserve the impartiality of their judiciary.

Some commentators have suggested that states chose judicial elections over judicial appointment systems because these states value democracy and accountability to the public over the appearance and actuality of judicial impartiality and independence.<sup>160</sup> Indeed, accountability

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155. See Dimino, *supra* note 1, at 348. Studies have shown that independent judicial decision-making is compromised when judges are elected: “[J]udges, just like other politicians, tailor their decisionmaking to the necessities of campaigns, changing their behavior in response to the expected reaction of the electorate.” *Id.* at 347–48; see also CHRIS W. BONNEAU, THE FEDERALIST SOC’Y, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS 7 (2012), [http://www.fed-soc.org/library/doclib/20120719\\_Bonneau2012WP.pdf](http://www.fed-soc.org/library/doclib/20120719_Bonneau2012WP.pdf) (“[T]he evidence is pretty clear that elected judges are responsive to their constituencies when it comes time to make decisions on the bench.”).

156. See *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (O’Connor, J., concurring) (“Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”).

157. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997) (paraphrasing the late Honorable Otto Kaus).

158. See *White*, 536 U.S. at 790.

159. *Id.*

160. See, e.g., Dimino, *supra* note 1, at 347; Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609, 621–22 (2010). Caleb Nelson, Professor of Law at the University of Virginia, has summarized various contemporary and historical opinions on why states chose judicial elections throughout the mid-1800s. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190–91 (1993). He notes that most scholars suggest the transition occurred as part of a wave of populist support for democracy. *Id.*; see also *White*, 536 U.S. at 791 (“[B]eginning with Georgia in 1812, States began adopting systems for judicial elections. From the 1830’s until the 1850’s, as part

plays an important role in the other branches of government, but to demand the judiciary be accountable to the public undermines the purpose of having an independent judiciary.<sup>161</sup> Elected judicial figures become politicians subject to the influence of the public and can fail to fulfill their role as a check on the other branches and protector of minority rights from a potentially tyrannical majority.<sup>162</sup>

*B. The Court Should Not Abridge First Amendment Principles to Achieve Judicial Impartiality and Independence*

Despite the threats to judicial independence and impartiality created by judicial elections, a majority of states today have judicial elections in some form or fashion.<sup>163</sup> In an attempt to protect the appearance and reality of judicial impartiality, many states have sought to regulate judicial speech during campaigns in an effort to eliminate some of the pressure created by the electoral process.<sup>164</sup> While the Court in *White* weakened the scope of what speech states can regulate,<sup>165</sup> in *Williams-Yulee* the Court upheld restrictions on judicial campaign speech in service of maintaining judicial independence and impartiality.<sup>166</sup> The Court's support of Florida's interest in judicial impartiality in *Williams-Yulee* is admirable; however, the means chosen to preserve that interest are troubling. By prohibiting personal solicitation of campaign funds by judicial candidates, the Court weakens the power of the First Amendment right to free speech in an area that right is supposed to be at its most powerful.<sup>167</sup>

In *Williams-Yulee*, the majority justifies the abridgement of judicial candidates' speech on the notion that judges are not like politicians, and this difference justifies regulating judicial elections differently than other elections.<sup>168</sup> In so doing, the majority implicitly emphasizes the distinction between judge, or potential judge, and candidate, suggesting that one's status as a judge, or one's pursuit of that status, "condition[s] the exercise of free speech" in a judicial election.<sup>169</sup> Indeed, the Court holds

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of the Jacksonian movement toward greater popular control of public office, this trend accelerated . . ." (citation omitted)).

161. See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (discussing the importance of an independent judiciary in maintaining constitutional safeguards for minority rights and the dangers an elected judiciary poses to that role).

162. See *id.* at 727.

163. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015).

164. See Dimino, *supra* note 1, at 314.

165. *Republican Party of Minn. v. White*, 536 U.S. 765, 787–88 (2002) (holding that Minnesota's "announce clause" was a violation of the First Amendment).

166. *Williams-Yulee*, 135 S. Ct. at 1673.

167. See *id.* at 1682–83 (Kennedy, J., dissenting).

168. *Id.* at 1662 (majority opinion).

169. BRIAN K. PINAIRE, *THE CONSTITUTION OF ELECTORAL SPEECH LAW: THE SUPREME COURT AND FREEDOM OF EXPRESSION IN CAMPAIGNS AND ELECTIONS* 73 (2008) (explaining that the judge/candidate distinction was relied upon by the dissenting justices in *White*). Many of the same arguments offered by the dissent in *White* are offered in *Williams-Yulee* by the majority.

judges to different First Amendment standards than ordinary citizens.<sup>170</sup> Judges are currently prevented from endorsing political candidates, soliciting charitable contributions, and participating in certain organizations, all of which are speech restrictions justified in the name of preserving judicial “dignity, integrity, and impartiality.”<sup>171</sup> While not all judicial candidates are governmental “employees,” one might argue that judicial candidates are “similarly situated” to governmental employees and that content-based restrictions on their speech are justified to protect judicial impartiality.<sup>172</sup>

While one might consider the restrictions on judicial and government employees’ speech to be violations of the First Amendment,<sup>173</sup> the fundamental issue with comparing content-based speech restrictions imposed on sitting judges and those imposed on judicial candidates is that judicial candidates are candidates in an election first, and judges, or potential judges, second.<sup>174</sup> Speech restrictions of the kind addressed in *Williams-Yulee* do not “restrict the speech of judges because they are judges,” but rather “regulate the content of candidate speech merely because the speakers are candidates.”<sup>175</sup> And while judges are not afforded full First Amendment protection in their capacity as government employees, candidates in elections should be granted the full protective force of the First Amendment.<sup>176</sup>

As mentioned previously, the First Amendment provides special protection for political speech because of its importance to the democratic process.<sup>177</sup> Candidate speech is a form of political speech and is at the heart of the primary justification for the First Amendment: self-governance.<sup>178</sup> Under the self-governance theory, candidate speech is protected because it is essential for voters to make informed decisions on which candidate to vote for.<sup>179</sup>

170. Charles Gardner Geyh, *The Jekyll and Hyde of First Amendment Limits on the Regulation of Judicial Campaign Speech*, 68 VAND. L. REV. EN BANC 83, 93 (2015); see also *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that government employee speech is not protected by the First Amendment when an employee makes a statement pursuant to his or her official duties).

171. Geyh, *supra* note 169, at 93; see also Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 971 (2014) (“Judges, of course, are government employees, and fall under the government employee rule established in *Garcetti v. Ceballos*.”).

172. Geyh, *supra* note 171, at 94–95.

173. This issue, while interesting, is beyond the scope of this Comment.

174. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1682–83 (2015) (Kennedy, J., dissenting) (emphasizing a judicial candidate’s status as a candidate in an election); *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., dissenting).

175. *White*, 536 U.S. at 796 (Kennedy, J., concurring).

176. See *Williams-Yulee*, 135 S. Ct. at 1682–83 (Kennedy, J., dissenting).

177. See *supra* Section I.A.

178. See *supra* Section I.A.; see also *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (“A candidate’s speech during an election campaign ‘occupies the core of the protection afforded by the First Amendment.’” (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995))).

179. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential,

Applying these principles to the facts of *Williams-Yulee*, the majority, in allowing states to prohibit judges from directly soliciting campaign funds from the public, has regulated political speech that is important for self-governance and democracy. While asking for money may not seem particularly significant to self-governance, “[w]hen a candidate asks someone for a campaign contribution, he tends . . . also to talk about his qualifications for office and his views on public issues.”<sup>180</sup> Certainly, judicial candidates have other ways of communicating their qualifications and views to voters, but a ban on direct campaign fund solicitation eliminates one important context in which those views can be communicated.<sup>181</sup> Further, restricting a judicial candidate’s ability to directly solicit campaign funds inhibits the ability of “low profile” challengers to raise money and prevents them from reaching the public to the same extent as other candidates.<sup>182</sup> The result is a “dead weight” on public debate—the sort of weight the First Amendment is designed to prevent.<sup>183</sup>

While the Court in *Williams-Yulee* justifies the abridgement of speech as serving the ends of judicial impartiality and independence,<sup>184</sup> those interests simply do not trump the importance of preserving the First Amendment right to freedom of speech for electoral candidates. As Justice Kennedy stated in *White*, “restrictions on political speech are ‘expressly and positively forbidden by’ the First Amendment.”<sup>185</sup> Simply put, once a State has chosen to hold judicial elections, “the First Amendment protects the candidate’s right to speak and the public’s ensuing right to open and robust debate,”<sup>186</sup> and “[t]he State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.”<sup>187</sup> The importance of maintaining free discourse and open debate in elections throughout our society is simply too great to be overcome by the interest of judicial impartial-

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for the identities of those who are elected will inevitably shape the course that we follow as a nation.”), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

180. *Williams-Yulee*, 135 S. Ct. at 1676 (Scalia, J., dissenting); *see also* *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

181. *See Williams-Yulee*, 135 S. Ct. at 1676 (Scalia, J., dissenting). Candidates can share their qualifications and campaign platforms with the public by giving political speeches, purchasing advertisements on television and in newspapers, participating in debates, etc.

182. *Id.* at 1683 (Kennedy, J., dissenting); *see also* *Carey v. Wolnitzek*, 614 F.3d 189, 204 (6th Cir. 2010).

183. *Williams-Yulee*, 135 S. Ct. at 1683 (Kennedy, J., dissenting) (describing the majority’s ruling as “dead weight” tied to public debate by illustrating how “low profile” judicial challengers are disadvantaged by restrictions on direct solicitation).

184. *Id.* at 1666 (majority opinion) (“We have recognized the ‘vital state interest’ in safeguarding ‘public confidence in the fairness and integrity of the nation’s elected judges.’” (quoting *Caperon v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009))).

185. *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964)).

186. *Williams-Yulee*, 135 S. Ct. at 1684 (Kennedy, J., dissenting).

187. *White*, 536 U.S. at 795 (Kennedy, J., concurring).

ity.<sup>188</sup> Thus, *Williams-Yulee* provides the wrong way of solving the problem of judicial impartiality. The decision solves that problem only marginally while undermining one of the fundamental justifications for the First Amendment.

*C. Recusal as a Speech-Protecting Option in Maintaining Judicial Impartiality*

In her argument to the Court, *Williams-Yulee* suggested that Florida could preserve its interest in judicial impartiality through recusal procedures.<sup>189</sup> *Williams-Yulee* is not alone in this contention; many commentators have suggested that recusal procedures offer a viable solution to the inherent tension between judicial elections and judicial impartiality.<sup>190</sup> In his concurring opinion in *White*, Justice Kennedy reasoned that states concerned over judicial impartiality "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."<sup>191</sup> However, the Court rejected *Williams-Yulee*'s argument, reasoning that recusal procedures could overwhelm some jurisdictions, exacerbate concerns over the appearance of impartiality, and incentivize lawyers to donate to judicial campaigns for the sole purpose of triggering recusal.<sup>192</sup>

The majority opinion in *Williams-Yulee* is correct to hold that current recusal procedures are inadequate protections of judicial impartiality.<sup>193</sup> In *Caperton*, the Court established that the Constitution only requires judicial recusal in extreme cases where the "probability of bias" is overwhelming.<sup>194</sup> As previously mentioned,<sup>195</sup> the current ABA Model Code of Judicial Conduct suggests that judges should recuse themselves when they know a party or their attorney donated money to their campaign,<sup>196</sup> but numerous states have not adopted this provision.<sup>197</sup> These facts indicate that judges are not required to recuse themselves when confronted by campaign contributors in almost all cases. Further, the

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188. *Williams-Yulee*, 135 S. Ct. at 1682–83 (Kennedy, J., dissenting) ("The Court's decision in this case imperils the content neutrality essential both for individual speech and the election process."); see also *Carey*, 614 F.3d at 204–05 ("[I]t is tempting to say that any limitation on a candidate's right to ask for a campaign contribution is one limitation too many.").

189. *Williams-Yulee*, 135 S. Ct. at 1671.

190. Genelle I. Belmas & Jason M. Shepard, *Speaking from the Bench: Judicial Campaigns, Judges' Speech, and the First Amendment*, 58 *DRAKE L. REV.* 709, 733–35 (2010); Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 *LOY. L.A. L. REV.* 671 (2009); David K. Stott, Comment, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 *BYU L. REV.* 481, 481–82 (2009).

191. *White*, 536 U.S. at 794 (Kennedy, J., concurring).

192. *Williams-Yulee*, 135 S. Ct. at 1671–72.

193. See *id.*

194. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

195. See sources cited *supra* note 69.

196. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(4) (AM. BAR ASS'N 2010).

197. See ABA, COMPARISON, *supra* note 69, at 3–16.

most serious problem with recusal procedures as they exist now is that the procedures ask judges to recuse themselves.

Recusals currently occur either when judges recuse themselves for meeting one of their state's recusal conditions or when litigants file a motion to disqualify a judge.<sup>198</sup> In the latter scenario, the challenged judge determines whether to accept or deny the motion.<sup>199</sup> Either way, judges end up evaluating their own impartiality. The problem with this system is that judges are typically inclined to determine that they are not biased and are fully capable of overseeing the litigation in an impartial manner.<sup>200</sup> This method could be problematic, and studies on judicial bias suggest that these self-determinations may not be accurate since judges often rule in favor of their campaign contributors.<sup>201</sup> Further, litigants can be hesitant to file a motion to disqualify a judge, fearing that the judge will take offense and disadvantage them throughout the rest of the proceedings.<sup>202</sup> Thus, current recusal procedures are weak shields against the threat campaign contributions pose to judicial impartiality.

Commentators have suggested numerous revisions to the current recusal standards in an effort to alleviate the concerns raised by campaign contributions.<sup>203</sup> In particular, states could create rules that consider the dollar amount or percentage of total contributions a donor makes to a judicial campaign, the time the donation was made, and the motivations surrounding the donor's contributions in determining when a judge should recuse himself or herself.<sup>204</sup> While such rules may provide some benefit in combating contributor threats to judicial impartiality, they do not address the underlying issue that judges evaluate themselves in recusal proceedings.

Of course, a possible solution to this issue would be to have other judges review recusal proceedings, but this procedure is not without its own problems. For one, appellate judges do not typically overrule recusal denials because judges do not like "investigating and ruling on the integrity of fellow judges and [often] do not look favorably on litigants who

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198. Stott, *supra* note 190, at 500.

199. *Id.*

200. See Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 480 (2006).

201. See *supra* note 74.

202. Sparling, *supra* note 200, at 480; Stott, *supra* note 190, at 500.

203. See *supra* note 190 and accompanying text.

204. Belmas & Shepard, *supra* note 190, at 734–35 (arguing that recusal procedures should consider the relative amount a donor contributed to a judge's campaign, "the issues they favor in their support, and the timing of the donation"). The authors reject a bright line specifying what amount of money creates a conflict. *Id.* at 734. Instead, they advocate for a reasonableness standard where judges must recuse themselves when "a reasonable person would believe that the total amount spent [by the donor], the proportion of that amount in the election, and the effect of the contribution on the election's outcome would require [the judge's] recusal." *Id.*



question the integrity of the court.”<sup>205</sup> These sentiments likely would be shared by lower-court judges reviewing the denied recusal motions of their peers. And with the dockets of many jurisdictions overflowing with cases, other judges may simply defer to the judgment of their peers for the sake of efficiency.<sup>206</sup>

Finally, states could impose automatic judicial disqualifications under certain circumstances when a party who donated to a judge’s campaign appears before that judge in court. States could consider the dollar amount contributed by an individual or organization, as well as the proportion of that donation in relation to the judge’s total campaign expenditures, and place a defined limit on one or both.<sup>207</sup> Such procedures would eliminate the issue of having judges evaluate their own impartiality and would not require third party judges to intervene either. One criticism of automatic recusals offered by Justice Roberts in *Williams-Yulee* is that some jurisdictions could run into problems if certain donors contribute to numerous judges’ campaigns, and a situation could arise where a court could not try a party because every available judge would have to recuse themselves.<sup>208</sup> However, such situations are unlikely to occur often, and jurisdictions could create measures to override automatic recusals in such circumstances—perhaps by selecting the judge who benefited the least from that individual or group’s contribution.

*D. The Best Way to Preserve Judicial Impartiality and Independence Is to Advocate for Lifetime Judicial Appointment, but Politics Gets in the Way*

Even assuming that it is permissible to censor judicial speech in some circumstances, as the Court did in *Williams-Yulee*, no amount of speech abridgement will solve the underlying issues of judicial bias created by judicial election. As Justice Scalia pointed out in his dissent, the Florida canon addresses one small area where the appearance and reality of judicial impartiality could be compromised.<sup>209</sup> Even if conduct rules forbid judges from making any statements during their elections, they would still be subject to pressure from public scrutiny of their decisions.<sup>210</sup> No restriction on judicial campaign speech can mitigate this basic fact of judicial elections. Similarly, state-created recusal procedures, while arguably a better approach to preserving judicial integrity

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205. Stott, *supra* note 190, at 501.

206. *See id.* at 501–02.

207. These procedures are similar to those offered by Belmas & Shepard, *supra* note 190, and ABA Model Code of Judicial Conduct A(4), *supra* note 69. The key to these procedures working is that they must be automatic, not discretionary.

208. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct 1656, 1671–72 (2015).

209. *See id.* at 1682 (Scalia, J., dissenting).

210. *See Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (O’Connor, J., concurring) (describing the effect of public pressure on elected judges).

than restricting campaign speech,<sup>211</sup> fail to eliminate public pressure on judicial decision-making. Recusals can ease the burden placed on judges when confronted with campaign contributors in their courtrooms, but the underlying pressure of public approval still looms in the background of any decision made by an elected judge.<sup>212</sup>

Having concluded that speech should not be abridged in any election and that recusal procedures cannot fully preserve judicial impartiality and independence, the best option to preserve judicial impartiality and independence is to advocate for the end of judicial elections and the adoption of lifetime judicial appointments. The integrity of elections in this country must be preserved, but the existence of judicial elections need not be. By adopting appointment systems like that of the federal government's, state governments can free their judiciaries from the pressures of the public and financial supporters and ensure the impartiality and independence of their judiciaries without compromising the interest of free speech in elections.<sup>213</sup>

The problem with advocating for states to model the federal system of judicial appointment is that, in the current political climate, widespread and sweeping reform in this direction appears to be virtually impossible. For one, neither the Supreme Court nor Congress can compel states to end judicial elections. Further, judicial elections remain popular amongst voters<sup>214</sup> despite the fact that voters acknowledge that campaign contributions influence judicial decision-making.<sup>215</sup> Recently, activists have aimed their reform efforts at implementing merit selection,<sup>216</sup> and voters have met even this movement with considerable resistance.<sup>217</sup> In fact, much of the legislative action in 2015 amongst states that already employ merit selection has been aimed at either substantially reforming merit selection or abolishing it altogether.<sup>218</sup>

What, then, can concerned parties do to preserve both judicial independence and impartiality? Implementing automatic recusal rules is the second-best option for maintaining judicial impartiality after state adoption of the federal system, but implementing such measures would not be

211. See Belmas & Shepard, *supra* note 190, at 714.

212. See *White*, 536 U.S. at 789; Uelmen, *supra* note 157, at 1113.

213. See THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Penguin Books ed., 1987) (arguing that federal judges should be appointed for life "during good behavior" to keep them completely free of influence from the people and the other branches of government).

214. Press Release, Harris Interactive, Most Americans Want State Judges to Be Elected (Oct. 20, 2008), <http://media.theharrispoll.com/documents/Harris-Interactive-Poll-Research-Electing-judges-2008-10.pdf>.

215. Sample et al., *supra* note 4, at 56.

216. For a brief discussion of merit selection, see *supra* note 146.

217. See Sample et al., *supra* note 4, at 57.

218. Bill Raftery, *Review of 2015 Efforts to Change, Alter, or End Merit Selection/Commission Based Judicial Appointment Systems*, GAVEL TO GAVEL (Aug. 13, 2015), <http://gaveltogavel.us/2015/08/13/review-of-2015-efforts-to-change-alter-or-end-merit-selectioncommission-based-judicial-appointment-systems/>.

without its own problems. In particular, state courts may be resistant to legislative action requiring judicial recusal in certain circumstances as a violation of separation of powers, and courts could even strike down recusal measures implemented by state legislatures.<sup>219</sup> Thus, it will likely fall upon state courts to implement additional recusal standards, and most states have been slow to implement more stringent recusal rules post-*Caperton*.<sup>220</sup> And, as mentioned above, judicial recusal does nothing to solve the fundamental problems judicial elections pose to judicial independence. So long as there are judicial elections, true judicial independence cannot be achieved. However, since solving some problems is better than solving none, maintaining judicial impartiality by way of automatic recusal standards would be a step in the right direction.

### CONCLUSION

The *Williams-Yulee* decision is an attempt by the Court to cure some of the ills of judicial elections, and those ills undoubtedly need to be remedied. However, the Court created an even bigger problem by abridging judicial candidates' freedom of speech. While the Court may wish to help states in their efforts to preserve judicial impartiality, once a state has opted to hold judicial elections, it must suffer the full consequences of that decision regardless of the problems those elections create. Those states have "voluntarily taken on the risks [of] judicial bias,"<sup>221</sup> and the only way to eliminate those risks is for that state to get rid of judicial elections.

The better way to preserve judicial impartiality and independence is to advocate for states to model the federal system of judicial selection. However, this solution is infeasible in the current political climate, so the Court, the ABA, and the public should instead encourage states to implement automatic recusal rules in particular situations. Automatic recusal procedures cannot completely remedy the threats posed to judicial independence by contested elections, but in a world of political second-bests, such solutions will have to do for the time being.

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219. Martin H. Belsky, *Electing our Judges and Judicial Independence: The Supreme Court's "Triple Whammy,"* 2 AKRON J. CONST. L. & POL'Y 147, 160 (2011).

220. See, e.g., ABA, *COMPARISON*, *supra* note 69, at 3–16.

221. *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).

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